

WASHINGTON STATE HYDRAULIC APPEALS BOARD
ENVIRONMENTAL HEARINGS OFFICE
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“Your Right to Be Heard”

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This is your informal guide to your rights and responsibilities in an appeal. It is not exclusive and **does not have force and effect of state law or regulation**. More detailed information, in RCW 77.55, which creates the Hydraulic Appeals Board, and in a chapter of the Washington Administrative Code entitled, "Rules of Practice and Procedure of the Environmental Hearings Office (Hydraulic Appeals Board), WAC 259-04, is available at your county law library or upon request from the Environmental Hearings Office and at the Environmental Hearings Office website at <http://www.eho.wa.gov>. For more detailed information, please open up on the web page the *Environmental Hearings Office Handbook* and the *Environmental Hearings Office Sample Formbook*. ALTERNATE FORMAT AVAILABLE UPON REQUEST

YOUR RIGHT TO BE HEARD

The Hydraulic Appeals Board (HAB) hears appeals from certain hydraulic project approval (HPA) decisions made by the Department of Fish and Wildlife (WDFW).

Three types of HPA's appealable to the HAB are:

- (1) agricultural
- (2) marine beach bulkheads
- (3) off-site mitigation for protection of fish life

The Board's sole function is to give you, and all other litigants in a disputed matter, a full and complete hearing, as promptly as possible, followed by a fair and impartial written decision based on the facts and law.

The Board is not affiliated with any other state agency. The three members of the Board are the Director of the Department of Ecology or the Director's designee, the Director of the Department of Agriculture or the Director's designee, and the Director of the Department of Fish and Wildlife or the Director's designee. This quasi-judicial state agency is independent of and separate from any other state, regional or local unit of government.

DO YOU NEED AN ATTORNEY?

An attorney may represent you, but the law does not require one. However, you should carefully consider whether a lawyer would be helpful, before you decide to represent yourself. The appeal process can be complicated and your rights are at stake.

The hearings are conducted more like court trials, instead of city council meetings.

WHEN, WHERE, AND HOW TO FILE AN APPEAL

No fee is required for filing an appeal.

The Board must RECEIVE your appeal within 30 days of the receipt of decision you are appealing from.

The original of the appeal must be filed with the Board at:

Hydraulic Appeals Board
4224 6th Avenue SE
Bldg 2 Rowe Six
PO Box 40903
Lacey WA 98504-0903

You should also serve a copy of your appeal on the

Department of Fish & Wildlife
600 Capitol Way North
Olympia WA 98504-1091

You should also serve a copy of your appeal on the holder of the permit, unless you are the permittee.

Service on all parties shall be by personal service or by mail. Service by mail is effective on the date of mailing; however, filing with the Board is only effective on actual receipt by the Board.

Filing of the appeal does not stop (stay) the effectiveness of an appealed permit. For information on how to obtain a stay or temporary restraining order, please refer to RCW 43.21B.320 and Civil Rules for Superior Court 65 (CR 65).

CONTENT OF THE APPEAL

Your appeal should include the following items:

- A copy of the permit you are appealing and a copy of the application.
- Your name and address (mailing and legal, if different) and, if applicable,

the name and address of your representative.

- A daytime phone number.
- A brief statement why you are appealing.
- The relief you seek (what you want the Board to do).
- A statement, signed by you or your representative, attesting the content of the appeal is true.

IF YOUR PERMIT IS APPEALED

If you have been granted a permit by the Department of Fish and Wildlife, but another party has appealed, you have a right to defend the permit and are automatically a respondent in the appeal before the Board. All subsequent sections in this publication apply to you as well as to the appellant.

HEARING DATES

When an appeal is filed, the Board will assign and notify you of a date for hearing the case.

THE PRE-HEARING CONFERENCE

Soon after the appeal is filed, a pre-hearing conference is scheduled with the Presiding Officer. The pre-hearing conference is usually held within 4-6 weeks of the appeals' filing and is often conducted by telephone. This conference is not for the purpose of arguing your case. The conference has three purposes: to discuss interest in settlement, including use of the Board's no-cost mediation program, to determine the legal issues, and to set a schedule for preparing the case for hearing if settlement is not reached. Prior to the pre-hearing conference each party is required to submit a preliminary list of legal issues, proposed witnesses and exhibits. After the pre-hearing conference, a written pre-hearing order will be mailed to the parties. It will include the hearing date, the list of legal issues, hearing preparation deadlines, and other important procedural information.

CAN THIS DISPUTE BE SETTLED?

Litigation is time and energy consuming for the parties. Each party needs to think about possible compromise. For settlement to be reached, each side needs to offer something. Parties are encouraged to

begin settlement talks, without waiting for Board participation.

The Board has a no-cost mediation program to assist parties in reaching settlement. It is a voluntary program offered to the parties without charge. All parties must agree to mediate before a mediation can be scheduled. A trained administrative law judge will work with the parties to resolve the case.

If the parties settle directly or through mediation, a written document containing the settlement terms will ultimately be signed by all, and filed with the Board, which will dismiss the appeal if the settlement conforms to the law.

BEFORE THE HEARING

Before the hearing you will want to prepare. You have the right to review the agency's file of their decision. Contact it to arrange a time and place to see the file.

You and the other parties have the right to find out in advance what witnesses and other evidence will be used at the hearing. This may be provided to you without formal procedures, such as by looking at public records. If done formally, **discovery** is best accomplished with the assistance of a lawyer. Examples of formal discovery are: **Deposition**-questioning witnesses before the hearing, under oath with a court reporter present. **Interrogatory**-presenting written questions to the other side. There are formal rules that apply to discovery.

MOTIONS

Any party may file a motion. A motion is a request by one of the parties asking the Board, or the Presiding Officer to rule on a particular issue.

A motion may be dispositive or non-dispositive. A dispositive motion may be based on an issue or issues, or the whole case. A non-dispositive motion is a request for relief, which does not decide an issue or issues or the whole case. An example of a non-dispositive motion is a motion in limine. A motion in limine asks the Board, in advance of the hearing to exclude certain evidence. Dispositive motions are decided by the full Board. An example of a dispositive motion is a motion for summary judgment. A motion for summary judgment is typically based on sworn statements of fact from a person

having personal knowledge of the facts alleged. A sworn statement may be either a declaration or an affidavit. An example of a declaration may be found on page 28 of the Environmental Hearings Office (EHO) Sample Formbook. This Formbook may be found by going to the EHO website. The website is: <http://www.eho.wa.gov>. After you have opened to the home page, click on the "Resources" button under "Research." When that page opens up, click on "The Environmental Hearings Office Sample Formbook" under "Other Resources."

A declaration or affidavit may also identify and attach documents as exhibits. This is the format of the declaration contained in the EHO Sample Formbook.

Dispositive Motions

The scheduling of dispositive motions is set forth in the pre-hearing order. An original and sufficient copies of the dispositive motion for each Board member and the Presiding Officer, if the Presiding Officer is not a Board member, shall be filed with the Board. A copy should be served simultaneously on the date the motion is filed, on each party in the case.

Any party opposing the motion will typically have 10 days from the day it received the motion, to file an original and the requisite copies of a response with the Board, and serve a copy on each of the other parties. The moving party generally will have seven days from the date it receives the response, to file an original and the requisite copies of a reply with the Board, and serve a copy on each of the other parties. Any party may request an oral hearing from the Presiding Officer on the motion. The Presiding Officer determines whether to grant or deny the request. If the request is granted, the parties will typically personally present their oral argument to the Board at its hearing room in Lacey, Washington.

Non-dispositive Motions

The deadlines for responding and replying to non-dispositive motions will generally be shorter than the above deadlines for dispositive motions. Additionally, most non-dispositive motions will be reviewed and decided solely by the presiding officer. In those situations, the parties need only supply an original and one copy of the pleadings to the Board.

HEARING

At the hearing, it is important to be **on time**. An appellant's failure to appear may result in dismissal of the appeal.

You will have your full opportunity to present your side of the case, but there is a court procedure to be followed, so that all sides can be heard in an orderly manner.

The Presiding Officer for the Board manages the proceedings. A court reporter will record what is said. The appellant usually has the obligation to present his or her case first. Then, the respondents will present their case. In a case involving a penalty or a regulatory order, the agency assessing the penalty is required to present its case first.

Each side has the right to make an **opening statement**, briefly outlining what its evidence will be. After the opening statements, the parties with the burden of proof will present its evidence. In a penalty or regulatory action, the agency has the burden of proof and will call witnesses first. In a permit appeal, the appealing party has the burden of proof and presents its witnesses first at the hearing.

In certain cases, the Presiding Officer may determine a **site visit** would be helpful to the Board's understanding of the evidence. At such a visit, the parties are requested to limit communication with the Board during the site visit. It is appropriate to point out physical landmarks, to help the Board later, at the hearing, but a court reporter is not present during the site visit, and it is not the time to present evidence or argue your case.

After the site visit, we return to the hearing.

Witnesses who are sworn to tell the truth, testify from their personal knowledge in response to questions from the party calling that witness. After this **direct testimony**, the witness answers questions asked by the other parties during "**cross-examination**." The Board members may also ask questions.

Persons essential to your case need to be present at the hearing to testify as witnesses. The "hearsay" rule prevents you from testifying for them or relating what they know or what they have said.

Exhibits, such as letters, contracts, photographs, and maps, etc. may be

offered as evidence. Before the hearing, number your exhibits and prepare an exhibit list. At the hearing, you will need to have the original and one copy for each member of the Board, the Presiding Officer, if not a member of the Board, and for the other parties. If you have multiple exhibits, please place them in a binder.

After all the evidence has been presented, litigants can summarize their arguments in closing statements. The hearing is then closed and no further evidence is taken.

THE BOARD'S DECISION

The Board will deliberate on the testimony, exhibits, and final arguments, before issuing a written decision.

The written decision called "Findings of Fact, Conclusions of Law and Order" is prepared and mailed to all litigants generally within 90 days after the hearing, or after the submission of memoranda, briefs, or proposed findings.

YOU MAY APPEAL THE FINAL ORDER

The Board's decision may be appealed to Superior Court within 30 days from the date of the **ORDER is received**, or you may file a petition with the Board for a reconsideration within 10 days of the date of the mailing of the **ORDER**.

You may appeal the Board's final action on a petition for reconsideration within 20 days from the date the order is mailed. Please note, if the Board fails to act on the petition with 20 days of its filing, it is deemed denied.

FREQUENTLY USED TERMS

APPEAL: A request for review of a hydraulic project approval (HPA) decision by Fish & Wildlife.

APPELLANT: A person or entity bringing the appeal.

BOARD: The Washington State Hydraulic Appeals Board.

FISH AND WILDLIFE: The Washington State Department of Fish & Wildlife.

DISMISSAL: Dismissal is an order entered by the Board terminating the appeal, canceling the hearing, and ending the Board's consideration of the case.

INTERVENOR: A third party asking to be heard in an appeal.

PARTY: A person who is an appellant, respondent, or intervenor.

PERSON: An individual, partnership, corporation, association, organization, governmental subdivision, agency, or entity of any character.

PRESIDING OFFICER: A member of the Board or an Administrative Appeals Judge who is assigned by the chair or vice-chair to conduct a conference or hearing.

RESPONDENT: A person or entity on the other side of the dispute from the appellant.

STIPULATION: An agreement between the parties.

The Environmental Hearings Office does not discriminate in employment or any of its services against persons with disabilities, and will make reasonable accommodations for any citizen who needs assistance to participate in our hearings or other activities. If a party or a witness requires an interpreter, or qualifies for reasonable accommodations, that person shall notify the presiding officer at least three weeks before the hearing or situation for which assistance is needed.

Judy/Office/PCHBPAMP 4/05